UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION

WATCO TRANSLOADING, LLC

and

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO (LOCAL) USW 10-1	Cases 04-CA-136562 04-CA-137372 04-CA-138060 04-CA-141264 and 04-CA-141614
DENNIS ROSCOE, an Individual	Case 04-CA-138265

GENERAL COUNSEL'S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Mark Kaltenbach

Counsel for the General Counsel
National Labor Relations Board, Region 4
615 Chestnut Street
Suite 710
Philadelphia, PA 19106-4413

Dated: June 14, 2017

I. INTRODUCTION

The Consolidated Complaint ("Complaint") alleged that Watco Transloading, LLC ("Respondent") committed a variety of unfair labor practices, many, but not all, in response to an effort by its employees to form a union. On April 5, 2014, the Administrative Law Judge ("ALJ") issued a decision finding merit to a number of the allegations in the Complaint and dismissing other allegations. The General Counsel now asks the Board to correct certain errors in the ALJ's decision.

The Complaint alleged that Respondent unlawfully prohibited its employee John D. Peters ("Peters") from discussing a disciplinary interview with any other person. The ALJ found, as a factual matter, that Respondent prohibited Peters from discussing the interview as alleged. The ALJ also acknowledged that Respondent's action adversely impacted Peters's Section 7 rights. However, the ALJ concluded that this adverse impact was legally justified. The ALJ's legal conclusion is incorrect. Respondent did not carry its burden to show that its imposition on its employee's rights was legally justified.

The ALJ also failed to conclude that Respondent, through its manager Brian Spiller ("Spiller"), unlawfully interrogated employees concerning their union activity in early September 2014. The ALJ made factual findings that establish this violation. Specifically, the ALJ credited testimony that Spiller asked a group of employees why the employees would think about forming a union. The Board considers such inquiries unlawful interrogations that interfere with employees' right to unionize. The ALJ erred by failing to make this conclusion.

Two additional errors in the ALJ's decision appear to be mere oversights. First, the ALJ misidentified the sections of the Act Respondent violated when it issued two disciplinary

warnings to employee Dennis Roscoe ("Roscoe") on August 21, 2014 because Roscoe engaged in protected concerted activity.

Second, the ALJ's order did not require Respondent to rescind all of the discipline it unlawfully issued to Roscoe on October 2, 2014, thereby leaving the remedy for the unfair labor practice found by the ALJ incomplete.

In addition, the ALJ failed to conclude that Respondent violated the Act when Spiller promised employees to try to procure them heavy gloves and hats or face masks on September 16 or 17, 2014, despite finding Spiller made such a promise. Similarly, the ALJ failed to conclude that Respondent violated the Act when Spiller solicited employees' grievances and promised to try to remedy them on that same occasion. Both failures were in error.

II. STATEMENT OF THE CASE

The Regional Director issued the Complaint on December 18, 2014, accusing Respondent of committing numerous violations of the Act. On February 11, 2015, the Regional Director amended the Complaint to request a particular remedy. The ALJ conducted a hearing regarding the Complaint on October 20, 21, and 22, 2015 and December 2, 2015, after which the General Counsel and Respondent submitted briefs.

The ALJ issued her decision on April 5, 2017, in which she found many of the Complaint allegations meritorious but dismissed some portions of the Complaint. Respondent submitted exceptions to the ALJ's decision on May 17, 2017 along with a supporting brief. The General Counsel submitted an answering brief to Respondent's exceptions on June 14, 2017. That same date, the General Counsel submitted cross-exceptions to the ALJ's decision along with the present brief in support of those cross-exceptions.

III. QUESTIONS INVOLVED

1. Did the ALJ correctly conclude that Respondent's prohibition against Peters discussing a disciplinary interview was legally justified (Cross-Exception 1)?
2. Did Respondent's questioning of employees as to why the employees wanted a union constitute an unlawful interrogation (Cross-Exception 2)?
3. Did the ALJ correctly identify the sections of the Act violated by Respondent's issuance of two disciplinary warnings to Roscoe on August 21, 2014 because he engaged in protected concerted activity (Cross-Exception 3)?
4. Did the ALJ err by neglecting to require Respondent to rescind all of the discipline it unlawfully issued to Roscoe on October 2, 2014 because of his union activity (Cross-Exception 4)?
5. Did Respondent's promise, made shortly before the election, to try to procure heavy gloves and hats or face masks for employees violate Section 8(a)(1) (Cross-Exception 5)?
6. Did Respondent violate Section 8(a)(1) when, shortly before the election, it asked employees for their grievances and promised to try to resolve all of them (Cross-Exception 6)?

IV. ARGUMENT

A. Respondent's Prohibition On Its Employee Discussing a Disciplinary Interview

1. Facts

The ALJ credited Peters's testimony regarding what Respondent's manager Brooke Beasley ("Beasley") told Peters when she interviewed him on August 5, 2014 as part of an

investigation into allegations that Peters engaged in misconduct (ALJD at 6).[1] According to Peters, Beasley called him on the telephone and told him that Respondent "was conducting a confidential internal investigation" and that Peters "was absolutely forbidden to discuss any of this conversation with anyone." During the call, which lasted five or ten minutes, Beasley asked Peters about accusations that he called his co-worker Curtis Pettiford ("Pettiford") gay and other specific terms (Peters could not remember the terms) in an inappropriate way, and Peters categorically denied those accusations. (Tr. 167.)

Respondent's only evidence as to its reason for "absolutely forbidd[ing]" Peters from discussing "any of this conversation with anyone" (Tr. 167) was the following testimony by Beasley, set forth here in its entirety:

> [Respondent's Counsel]: Why is it that you would want [the employees Beasley interviewed on August 4 and 5, 2014, including Peters] to keep [the investigation] confidential while [the investigation] was ongoing?
>
> [Beasley]: For the integrity of the investigation, we wouldn't want to intentionally or unintentionally skew any memories or facts of the events.

(Tr. 581.)

2. <u>Analysis</u>

Respondent's prohibition against Peters discussing the disciplinary interview with anyone violated the Act. "Employees have a Section 7 right to discuss discipline or ongoing disciplinary investigations involving themselves or coworkers." *Banner Estrella Medical Center*, 362 NLRB No. 137, slip op. at 2 (2015), enf. denied on other grounds and remanded 851 F.3d 35 (D.C. Cir. 2017); accord, *Caesar's Palace*, 336 NLRB 271, 272 (2001). "Such discussions are vital to employees' ability to aid one another in addressing employment terms and conditions with their

[1] Respondent did not except to the ALJ's decision to credit Peters over Beasley on this point.

employer." *Banner*, above, slip op. at 2. An outright employer-imposed ban on employees discussing a disciplinary investigation with anyone obviously impinges on the employees' right to discuss the investigation with other employees. See ibid. Such a ban interferes with employee rights regardless of whether it is imposed through an official employer rule or policy or through an instruction issued to a single employee. *Dish Network, LLC*, 365 NLRB No. 47, slip op. at 3 fn. 8 (2017); *American Federation of State County 5 MI Loc Michigan State Employees Association, AFL-CIO*, 364 NLRB No. 65, slip op. at 17 (2016) ("MSEA").

Although restrictions on employees discussing disciplinary investigations interfere with rights guaranteed by the Act, the Board allows an employer to impose such restrictions "where the employer shows that it has a legitimate and substantial business justification that outweighs employees' Section 7 rights." *Banner*, above, slip op. at 2. "[I]t is the employer's burden to justify a prohibition on employees discussing a particular ongoing investigation." Id., slip op. at 3. "[T]he employer's burden comprises two related components":

> First, the employer must proceed on a case-by-case basis. The employer cannot reflexively impose confidentiality requirements in all cases or in all cases of a particular type. Second, a determination that confidentiality *is* necessary in a particular case must be based on objectively reasonable grounds for believing that the integrity of the investigation will be compromised without confidentiality.

Ibid. (emphasis in original).

The Board has made clear that an employer's "effort to prohibit communication which otherwise would be protected" constitutes "an infringement on employees' Section 7 rights [that] is extraordinary, and there must be extraordinary circumstances to justify it." *MSEA*, 364 NLRB No. 65, slip op. at 17. It has also made clear that prohibitions on employee discussions of disciplinary investigations cannot be justified by the employer's "generalized concern about protecting the integrity of *all* of its investigations." *The Boeing Company*, 362 NLRB No. 195,

slip op. at 2 (2015); accord, *Banner*, above, slip op. at 4 ("the Respondent's generalized concern was insufficient to outweigh employees' Section 7 rights"). "Rather, it [i]s the Respondent's burden to demonstrate that, in connection with a particular investigation, there was an objectively reasonable basis for seeking confidentiality, such as where 'witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, or there is a need to prevent a cover up.'" *Banner*, above at 4 (quoting *Hyundai America Shipping Agency*, 357 NLRB 860, 874 (2011), enfd. in relevant part 805 F.3d 309 (D.C. Cir. 2015)).

Here, according to the credited testimony, Beasley instructed Peters that he "was absolutely forbidden to discuss any of this conversation [which was part of a disciplinary investigation into Peters] with anyone" (Tr. 167). This prohibition infringed on Peters's "Section 7 right to discuss discipline or ongoing disciplinary investigations involving [himself] or coworkers." *Banner*, above, slip op. at 2. It makes no difference that the prohibition took the form of an instruction given by Beasley to Peters as opposed to a general rule—the Respondent still prohibited conversations protected by the Act. *Dish*, above, slip op. at 3 fn. 8; *MSEA*, above, slip op. at 17.

Nor did Respondent carry its burden to justify the prohibition. There is no evidence that Respondent conducted *any* particularized evaluation of its investigation into Peters prior to imposing the prohibition, let alone that it had "objectively reasonable grounds for believing that the integrity of the investigation w[ould] be compromised without confidentiality." *Banner*, above, slip op. at 3. Indeed, the only evidence offered by the Respondent to justify its infringement on its employee's rights was Beasley's testimony that it committed the infringement "[f]or the integrity of the investigation, we wouldn't want to intentionally or

unintentionally skew any memories or facts of the events" (Tr. 581). "Respondent's generalized concern was insufficient to outweigh employees' Section 7 right." *Banner*, above, slip op. at 4; accord, *MSEA*, above, slip op. at 18 (employer's assertion that it imposed confidentiality to "protect the integrity of the investigation" inadequate to justify its interference with protected activity); *Advanced Services, Inc.*, 363 NLRB No. 71, slip op. at 3 (2015); *Boeing*, above, slip op. at 2. Therefore, Respondent violated Section 8(a)(1) of the Act by forbidding Peters from discussing the disciplinary investigation into allegations against him with any other person. The ALJ's conclusion to the contrary was erroneous.[2]

B. Respondent's Unlawful Interrogation of Its Employees

The Complaint alleges that, in early September 2014, Spiller "(1) solicited its employees' complaints and grievances, thereby promising them improved terms and conditions of their employment in order to discourage them from supporting the Union; (2) interrogated the employees concerning their Union sympathies; and (3) said that he would try to get $2.00 or $3.00 more for them," and that these actions violated Section 8(a)(1) of the Act (GC Exh. 1(q)). Although the ALJ found merit to numbers "(1)" and "(3)," she did not rule on number "(2)"—

[2] Chairman Miscimarra has expressed his own view regarding the circumstances in which an employer may restrict its employees' right to discuss disciplinary investigations. *Banner*, above, slip. op. at 7-21 (Miscimarra, dissenting in part). However, the Chairman concluded that an employer violated the Act by prohibiting its employee from discussing the contents of an investigatory questionnaire—"a requirement that had a substantial impact on the exercise of Sec. 7 rights"—where the employer's only justification was that confidentiality "was necessary 'to protect the integrity of the investigation.'" *MSEA*, 364 NLRB No. 65, slip op. at 2 fn. 6 (Miscimarra, concurring). The Chairman concluded that the employer's justification "lacked particularity and was unsupported by other evidence." Ibid. "Balancing the respective rights and interests, [then-]Member Miscimarra f[ound] that the Respondent ha[d] not established an interest justifying its nondisclosure requirement that outweighs the impact of that requirement on the exercise of Sec. 7 rights." Ibid.

The Respondent's justification in the present case is substantively indistinguishable from the justification the Chairman found insufficient in *MSEA*. Compare the employer's justification in *MSEA*, id., slip op. at 18, with the Respondent's justification here (Tr. 581). Therefore, even under the Chairman's view, the Respondent violated the Act in the present matter.

namely, that Spiller unlawfully interrogated the employees (ALJD at 12-13). However, her factual findings establish this violation.

1. Facts

The ALJ credited the testimony of employee Matthew Horne ("Horne") regarding Spiller's early September 2014 statements to a group of employees (ALJD at 12). Spiller held the position of "Terminal Manager" and was the highest ranking Respondent official in Philadelphia (Tr. 75, 106-07). According to Horne, in early September 2014, Spiller approached Horne and employees Marcell Salmond and Greg Baranyay in a trailer on the worksite in which the employees spent their downtime ("employee trailer") (Tr. at 75-76). There is no evidence that Horne, Salmond, or Baranyay were open union supporters. Spiller approached the employees holding a notepad and a writing instrument and asked "why we would want to bring the Union in" or "why we would think about trying to get the Union in here" (Tr. at 76). In response, the employees complained about a variety of terms and conditions, including that their wage rates were below-market (Tr. at 76-77). In response, Spiller promised to try to procure them a two to three dollar per hour raise (Tr. 77). A few days earlier, on August 26, 2014, Respondent had fired Peters, who, along with Roscoe, had initiated and led the effort to form a union among Respondent's employees, because of Peters's union activity in violation of Sections 8(a)(3) and (1) of the Act (ALJD at pp. 9-10).

2. Analysis

Spiller questioning employees as to why the employees would think about unionizing constituted an unlawful interrogation in violation of Section 8(a)(1). To determine whether an employer's questioning of its employees regarding their or their co-workers' union activities or sympathies is unlawful, "the Board evaluates 'whether under all the circumstances the

interrogation reasonably tended to restrain, coerce, or interfere with rights guaranteed by the Act.'" *Southern Bakeries, LLC*, 364 NLRB No. 64, slip op. at 7 (2016) (quoting *Rossmore House*, 269 NLRB 1176, 1177 (1984), affd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985)).

In *Beverly Enterprises*, 326 NLRB 153 (1998), enfd. in relevant part 227 F.3d 817 (7th Cir. 2000), cert. denied 121 S.Ct. 2592, an "area manager," shortly after a union organizing drive began, told a group of employees "that he was aware that the employees were organizing, and asked them why," and "also asked the employees why they were starting problems," in response to which "[s]everal employees…air[ed] their grievances." Id. at 154. The Board found that the manager's inquiry "was calculated to elicit a response from employees concerning their union sympathies" and constituted an interrogation. Id. at 154-55. The Board also found the interrogation occurred "under coercive circumstances," noting that it took place on the employer's initiative, that it was conducted by a high-ranking official, and that the employer's displeasure with the organizing drive was apparent. Id. at 155. The Board concluded that the inquiry constituted an unlawful interrogation in violation of the Act. Ibid.; see also *Foamex*, 315 NLRB 858, 860-62 (1994) (managers asking an employee "why the employees wanted the Union" and "what the problems were and why the employees wanted the Union" were unlawful interrogations).

Spiller's conduct here is remarkably similar to that which the Board determined to be an unlawful interrogation in *Beverly Enterprises*. Thus, here, as in *Beverly Enterprises*, a high-ranking manager—indeed, the highest-ranking person at the Philadelphia location, Spiller—initiated a meeting with employees in which he asked why the employees were organizing. *Beverly*, above at 155. In addition, the tenor of Spiller's questions (i.e., why would the

employees "think about trying to get the Union here") and his promise to try to procure employees a raise in response to their complaints would further have made clear Respondent's "displeasure with the Union," just as the manager's questions did in *Beverly*. Ibid. Furthermore, Spiller asked the questions just days after Respondent fired Peters, the leading proponent of the union drive, which would reasonably tend to suggest to the employees that Spiller was trying to ferret out Union supporters for more retaliation. See *Southern Bakeries,* above, slip op. at 7 (finding it significant that "the Respondent had a history of antiunion hostility and discrimination" in concluding that its questioning of employees about their union activities and sympathies was coercive). Therefore, "under all the circumstances," Spiller's "interrogation reasonably tended to restrain, coerce, or interfere with rights guaranteed by the Act." Ibid. (internal quotation marks omitted).

C. Additional Cross-Exceptions

The ALJ correctly concluded that Respondent issued two disciplinary warnings to Roscoe on August 21, 2014 because he engaged in protected concerted activity, but she misidentified the sections of the Act this conduct violated (ALJD at 13-14). Specifically, because the ALJ found that Respondent issued the warnings because of Roscoe's protected concerted—as opposed to union—activity, Respondent's conduct implicated Section 8(a)(1) only. Compare 29 USC § 158(a)(3) with 29 USC § 158(a)(1). However, the ALJ inadvertently stated that this conduct violated Section 8(a)(3) as well as Section 8(a)(1) (ALJD at 14, 17).

In addition, the ALJ determined that Respondent suspended Roscoe from September 23 through October 6, 2014 because of his union activity in violation of the Act and that its stated nondiscriminatory reasons for doing so were pretexts meant to conceal its unlawful motive (ALJD at 16). This unlawful suspension was accompanied by a "Final Written Warning" and

placement on a "Performance Improvement Plan" (GC Exh. 34). Although the ALJ's conclusions carry the necessary implication that these subsidiary disciplinary measures were issued because of Roscoe's union activity, the ALJ's order does not specifically mandate their rescission (ALJD at 19-20). This omission leaves Respondent's unfair labor practice less-than-fully remedied.

Finally, the ALJ credited the testimony of Horne regarding Spiller's interactions with a group of employees on September 16 and 17, 2014 (ALJD at 12). The ALJ concluded that on this occasion Spiller announced that he was ordering rain gear and boot slip-ons for the employees and thereby violated the Act (ALJD at 12-13). Although the ALJ's conclusion was correct, Horne's credited testimony established additional unlawful statements by Spiller during this meeting. Specifically, after announcing that he was ordering the employees the rain gear and boot slip-ons, Spiller promised to "do his best and see what he could do" to get heavy gloves and hats or face masks for the employees (Tr. 78-79). Spiller then solicited the employees' grievances and promised to "do the best that he could and look into" the grievances (Tr. 79-81). Each of these statements constituted an unlawful promise of benefits and an additional violation of Section 8(a)(1) beyond those violations already found by the ALJ. See, e.g., *Manor Care Health Services—Easton*, 356 NLRB 202, 220-22 (2010), enfd. 661 F.3d 1139 (D.C. Cir. 2011); *Maple Grove Health Care Center*, 330 NLRB 775, 775, 785 (2000); *Reliance Electric Co.*, 191 NLRB 44, 44-45 (1971), enfd. 457 F.2d 503 (6th Cir. 1972).

V. CONCLUSION

For the foregoing reasons, the General Counsel respectfully requests that the Board find merit to his cross-exceptions to the decision of the ALJ and correct that decision accordingly.

Respectfully submitted,

/s/ Mark Kaltenbach

Counsel for the General Counsel
National Labor Relations Board, Region 4
615 Chestnut Street
Suite 710
Philadelphia, Pennsylvania 19106-4413

Dated: June 14, 2017